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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

NO. 475

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

THE BERWIND-WHITE COAL MINING COMPANY,
Respondent.

MEMORANDUM FOR RESPONDENT.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
MARVIN LYONS,
Attorneys for Respondent.

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MEMORANDUM FOR RESPONDENT.

This case presents a question of the same general character as is presented in *McGoldrick* v. *Compagnie Generale Transatlantique* and *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, Nos. 44 and 45 respectively on the current docket of this Court, cases in which the petitioner's applications for certiorari were granted. There are, however, certain material factual differences between the instant case and Nos. 44 and 45 which are favorable to the respondent herein and which make the instant case a stronger case for the taxpayer than either No. 44 or No. 45.

The instant case, like Nos. 44 and 45, arose under the New York City Sales Tax Law, and in the instant case, as in Nos. 44 and 45, the New York Court of Appeals held that taxes levied by the petitioner upon sales in interstate commerce were invalid "upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (Art. 1, Sec. 8, cl. 3) of the Constitution of the United States". Petitioner's applications for certiorari in Nos. 44 and 45 were granted on June 5, 1939, and on October 9, 1939, this Court, on petitioner's motion, deferred the argument in

those cases until December 4, 1939, or such time as the petitions for certiorari in the instant case and in the case of *McGoldrick* v. *A. H. DuGrenier, Inc.* (No. 474) shall have been acted upon.

We maintain that the decision of the court below is clearly correct. The record in the present case leaves no room for doubt (1) that the sales here involved constitute transactions in interstate commerce and (2) that the taxes imposed upon such transactions are direct and undue burdens upon interstate commerce. Indeed, the facts of record in the present case afford even stronger support for these conclusions than do the facts of record in Nos. 44 and 45. We therefore maintain that irrespective of whether this Court should decide to affirm or reverse the decisions of the New York Court of Appeals in Nos. 44 and 45, the decision of the New York Court of Appeals in the present case is sound and should not be disturbed.

Although we confidently assert that the decision of the court below is correct, we do not oppose the granting of certiorari for the following reasons:

The taxes involved in the present case cover only the period from December 10, 1934 to December 31, 1935. So long as the City of New York continues to take the position that the respondent and its customers are liable for the sales tax upon respondent's interstate sales, the litigation with respect to this question may be expected to continue. On the other hand, a decision of this Court in this case will set the matter permanently at rest.

If this Court should grant certiorari in this case, we respectfully urge that the case be set down for argument together with Nos. 44 and 45.

Respectfully submitted,

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
MARVIN LYONS,
Attorneys for Respondent.